SUPREME COURT, U. S.

MAY 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 107

MATTHEW IANNIELLO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on February 21, 1968 (21 N.Y. 2d 418).

A. Opinions Below

There were various opinions in the various courts below as follows:

(1) Order of Mr. Justice Marks sitting at Special and Trial Term Part 30 in the Supreme Court of the State of New York, New York County, dated November 16, 1965,

denying pre-trial motion to dismiss indictment. (Annexed hereto as Appendix A). Said opinion is not officially reported.

(2) Order of Mr. Justice Marks sitting at Special and Trial Term Part 30 in the Supreme Court of the State of New York, New York County, dated June 22, 1966, which order granted reargument of the above-mentioned pre-trial motion and, upon reargument, dismissed the indictment upon the ground that it was obtained as a result of evidence secured by violating petitioner's 6th Amendment right of counsel. Said opinion and order is annexed to the petition as Appendix B. Said opinion is not officially reported.

(3) Opinions of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department thereof, affirming on June 15, 1967, upon appeal of the District Attorney, the order of Mr. Justice Marks dismissing the indictment. Said affirmance was by a divided court, three judges voting to affirm the dismissal and two judges dissenting. Said opinions are officially reported at 27 A.D. 2d 504. The majority and dissenting opinions are annexed to the petition as Appendix C and D respectively.

(4) Opinion of the Court of Appeals of the State of New York unanimously reversing the order of the Appellate Division of the Supreme Court of the State of New York, and reinstating the indictment upon appeal by the District Attorney. Said opinion is officially reported at 21 N.Y. 2d 418. A copy thereof is annexed to the petition as Appendix E.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of this Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code § 1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (21 N.Y. 2d 418) made on February 21, 1968 as aforesaid, and annexed hereto as Appendix F.

C. The Question Presented for Review

1. Does an indictment charging the crime of criminal contempt by evasive answers before a grand jury contravene the right to counsel under the Sixth Amendment to the United States Constitution where the alleged evasive answers were obtained from the defendant following a refusal by the grand jury and the prosecutor to allow the witness to leave the room to consult his attorney who was immediately outside the grand jury room?

D. Constitutional Provisions and Statute Involved

The constitutional provisions involved herein are that portion of the 6th amendment to the U.S. Constitution relating to the right of counsel and that portion of the 14th amendment relating to due process of law.

The statute involved is §600 of the Penal Law of the State of New York.

Each of the foregoing is set forth verbatim in this petition as appendices G, H, and I respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioner testified as a witness before a New York County Grand Jury investigating bribery and corruption among public officials. He testified at great length answering numerous questions put to him. He testified at separate sessions on June 11, 1964 and June 18, 1964. During the first session he requested, but was refused an opportunity to consult with counsel who was outside the Grand Jury room. This refusal and its ensuing consequences comprise the subject matter of this petition. During the second session petitioner did not make any request to consult with counsel.

Based upon the testimony thus elicited the Grand Jury indicted petitioner in a four count indictment charging him with criminal contempt in that his testimony that he could not recall certain occurrences or conversations was allegedly evasive.

Petitioner entered a plea of not guilty. Thereafter he moved to dismiss the indictment upon the ground, among other things, that the refusal to allow him an opportunity to consult with counsel outside the Grand Jury Room amounted to a deprivation of his right to counsel under the Sixth Amendment to the United States Constitution. That motion was originally denied. Subsequently the motion for reargument was granted and the Court dismissed the indictment by reason of the denial of counsel.

The District Attorney thereafter appealed to the Appellate Division of the Supreme Court of the State of New

York, First Judicial Department. The majority of that Court upheld the order dismissing the indictment—but upon other grounds, stating that in view of such other grounds it was "unnecessary to reach the issue of defendant's right to consult counsel * * *." The minority opinion took the view (citing *In Re Groban*, 352 U.S. 330) that "a witness is not entitled to counsel," and that in any event he had the benefit of counsel.

Thereafter the District Attorney obtained leave to appeal to the New York Court of Appeals. That Court reversed the order of the Appellate Division and reinstated the indictment. The New York Court of Appeals held, among other things, that while a witness in certain circumstances is entitled to leave the Grand Jury Room to consult with counsel, under the circumstances of the case at bar the witness was not so entitled. This approach is the subject matter of this petition and is expanded upon in sub-division G of this petition.

A motion for reargument was thereafter denied without opinion by the New York Court of Appeals.

The case is presently awaiting trial in the Supreme Court of New York County.

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The constitutional issues presented herein were raised at the first available opportunity, namely by timely pre-trial motion directed to the legal sufficiency of the indictment by attacking its sufficiency upon the ground that the

proceedings before the Grand Jury resulted in the instant indictment in violation of petitioner's rights under the 5th, 6th, and 14th amendments to the U.S. Constitution. The motion was made before the Hon. Charles Marks, a Justice of the New York Supreme Court and resulted originally in a denial of said motion as set forth in Appendix A. Subsequently a motion was made to reargue the original motion. As appears from Appendix B, Mr. Justice Marks, upon reargument, vacated his prior order and entered a new order dismissing the indictment upon the constitutional grounds therein set forth. The issues were thereafter reiterated and made the subject of the appeals in the Appellate Division of the Supreme Court and in the New York Court of Appeals.

C. Argument Amplifying the Reasons Relied On for Allowance of the Writ

POINT ONE

The refusal by the Grand Jury and the District Attorney to allow petitioner, while testifying before the Grand jury, to consult with counsel who was outside the room was a violation of his constitutional rights to counsel.

The issue posed herein is a novel one which does not appear to have been passed upon by this Court. Yet, while precedent may be lacking, guiding principles are not.

In the early stages of petitioner's examination before the Grand Jury he was questioned as to a certain conversation with one Benny Cohen. Petitioner thereupon requested

permission to leave the room for a minute to inquire of his attorney outside the room whether he was legally obliged to answer the questions.

Following that request a five page colloquy ensued between the witness (petitioner) and the assistant district attorney during which the witness repeatedly sought and was denied permission to consult his attorney. The entire colloquy is as follows:

> Q. Does that enable you to be able to deny ever having such a conversation with Benny Cohen? A. Could I excuse myself to see my attorney for a minute?
>
> By Mr. Scotti:
>
> Q. Your attorney doesn't know the answer. You are the one who knows. A. I want to ask him if it's a proper question.
>
> Q. I'm telling you, as legal advisor to this grand jury, it's a proper question. A. May I ask the foreman of the grand jury if I may excuse myself for a minute, please?
>
> Q. Mr. Ianiello, we are not going to consent to the practice of your excusing yourself to confer ostensibly with your attorney in order to find out what kind of an answer you should make. You are the one that is legally obligated to give testimony and not your attorney.
>
> Now, are you refusing to answer the question? A. I'm not refusing.
>
> Q. After you answer the question you can confer— A. I'd like to confer with my attorney because I think it's an improper question.
>
> Q. Why? A. I don't know.
>
> Q. Why? Why is it improper? You said you think it's improper. A. I wouldn't need an attorney outside if I knew why. I think it's an improper question.

Q. Why do you think it's improper, why? A. I don't know why.

Q. Because it's a very very serious matter. It involves your knowledge of payoffs, your knowledge of the fact that you were receiving information, confidential information from certain members of the Police Department, is that the reason why it bothers you? A. Mr. Scotti—

Q. You are on the spot, is that the reason? Is that the reason why you hesitate because an answer to that question, an affirmative answer, would mean to this grand jury that you are admitting that you do have information from the police and that you do business with the police? Is that what you are worried about? Is that what you are— A. Mr. Scotti, you are drawing conclusions. You made your statements, you might as well indict me. You have all the evidence.

Q. Why don't you want to answer the question? A. There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction.

The Witness: Go to court. I don't understand the question.

Mr. Scotti: We will go in open court, then, and make an application.

You don't understand the question.

Mr. Reporter, read the question.

The Witness: I didn't—

Mr. Scotti: Now, he said he doesn't understand the question.

The Witness: I didn't say—I said, "Will you please repeat the question. Don't jump conclusions.

Mr. Scotti: Read the question. Mr. Reporter, will you be good enough to read what the witness said a little while ago.

(Whereupon, the reporter read as follows:

"Question: Why don't you want to answer the question?

Answer: There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction?

The Witness: Go to court. I don't understand the question.

Mr. Scotti: We will go in open court, then, and make an application.")

Q. Now, has your memory been refreshed that you said you didn't understand the question? A. Yes, sir.

Q. We accept your apology. A. Thank you.

Q. Now, are you willing to answer the question?

The Witness: Mr. Foreman, may I please leave the room to consult with my attorney as to the significance of the question?

The Foreman: I can't give you permission to do so without consent of Mr Scotti.

Mr. Scotti: I advise the grand jury that this is a proper question and that there is no legal question involved.

Now, Mr. Foreman, I ask that you direct this witness to answer the question.

The Foreman: I so direct you to answer.

A. I don't recall the conversation.

The events thus recorded between a seasoned prosecutor and a lay witness before the Grand Jury which returned

this indictment depict a classic illustration of the wisdom of the framers of the Constitution when they wrote into that document the unalterable right to the assistance of counsel (U.S. Constitution Amendment 6; New York State Constitution, Article 1 §6).

The indictment at bar is exclusively predicated upon testimony obtained from this petitioner after the aforementioned incident had occurred.

The principles of law dealing with the right to counsel have in recent years been largely expanded with a view toward insuring a more sophisticated treatment of persons under interrogation by prosecuting officials. (*Miranda* v. *Arizona,* 384 U.S. 436.) This Court succinctly stated in *Massiah* v. *U.S.,* 377 U.S. 201, 204:

> "A constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' "

In *Ex Parte Sullivan,* 107 F. Supp. 514, 517-518 (quoted with the approval of *Escobedo* v. *Illinois,* 378 U.S. 478 at page 488), the Court commented:

> "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' "

It would therefore appear that upon well-established and long cherished principles of law the flat refusal of the Grand

Jury and the District Attorney to allow the then witness to speak to his counsel outside the Grand Jury room with respect to a perfectly reasonable desire on his part to ascertain the nature of his legal obligation to answer the questions propounded, deprived him of counsel. Such a deprivation of counsel must necessarily preclude the use of any statement or testimony thereafter given by the witness. Since the indictment was founded exclusively upon subsequent testimony the indictment was improperly obtained.

The New York Court of Appeals, in its opinion reinstating the indictment, while acknowledging the general right to counsel, qualified that right by limiting it to specific situations. In holding that this petitioner had no right to consult counsel, that Court said:

> "Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of grand jury investigation.
>
> "If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interest of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was 'proper.'"

We respectfully urge that the Constitutional guarantee of counsel carries no inherent characteristic attenuating its unqualified thrust. Counsel was readily available to the witness immediately outside the Grand Jury room. Petitioner sought his advice on but one occasion—and that request was capriciously denied by the prosecutor and the foreman. We are thus deeply and directly involved with the full meaning of the Constitutionally guaranteed right to the assistance of counsel, particularly when such assistance is affirmatively requested. To deny that right in the circumstances at bar would be to allow "illegitimate and unconstitutional practices [to] get their first footing—by silent approaches and slight deviation from legal modes of procedure." (*Boyd* v. *U.S.*, 116 U.S. 616, 635 [1886]).

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

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